

AFFIRMATIVE ACTION IN THE WORKPLACE: FORTY YEARS LATER

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I. INTRODUCTION

Perhaps no issue has generated as much controversy in the workplace as affirmative action.¹ Decades after the passage of the Civil Rights Act of 1964,² the legal parameters of permissible affirmative action remain unclear. Despite this uncertainty, the Supreme Court has not addressed this issue in the context of the private sector for over fifteen years. As a result, employers remain wary of adopting any form of affirmative action that includes preferential treatment on the basis of race, national origin, or gender.

Over the past forty years, affirmative action has diverged into three separate paths: government contractors, court-imposed relief, and volun-

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1. The term "affirmative action" is broadly used to encompass a variety of concepts ranging from numeric goals to diversity initiatives. In this article, unless otherwise specified, "affirmative action" refers to race, national origin, and/or gender-conscious plans or programs.

2. 42 U.S.C. §§ 2000e-2000e-17 (2000).

tary affirmative action. Of these three areas, voluntary affirmative action has been the most controversial, largely because the Supreme Court has been imprecise in defining permissible parameters.

In its first opinion on the issue, *United Steelworkers of America v. Weber*,³ the Supreme Court held that Title VII permits some, but not all, voluntary race-conscious affirmative action.⁴ The Court declined to define the “line of demarcation” between permissible and impermissible affirmative action, but observed that affirmative action designed to remedy past discrimination or conspicuous racial imbalances in traditionally segregated job categories is more likely to withstand challenge.⁵ Subsequent Supreme Court decisions have continued to focus almost exclusively on the remedial nature of affirmative action. This has arguably caused some employers to avoid adopting race, national origin, or gender-conscious affirmative action plans out of concern that the admission of past discrimination or a conspicuous workforce imbalance will adversely affect them in subsequent litigation or in terms of employee morale.

Two recent Supreme Court decisions in the university admissions context⁶ have rekindled debate on the extent that race, national origin, or gender preferences in employment can be justified by non-remedial purposes, such as workplace diversity.⁷ To the extent that the courts move from Title VII’s remedial purpose to diversity as a justification for preferential treatment, there is a greater chance that businesses will implement this type of affirmative action. The appellate courts, however, are split on this issue.⁸

In order to sift through the increasingly muddy waters of affirmative action, this article will provide an overview of the development of permissible preferential treatment based on race, national origin, or gender in the forty years since Title VII was enacted. Our discussion includes the state of the law for affirmative action plans adopted by government contractors as well as those that are judicially imposed. The

3. 443 U.S. 193 (1979).

4. *Id.* at 208.

5. *Id.*

6. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

7. See, e.g., Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451 (2004); Cynthia Estlund, *Taking Grutter to Work*, 7 THE GREEN BAG 215 (2004); Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263 (2003).

8. Compare *Schurr v. Resorts Int’l Hotel, Inc.*, 196 F.3d 486, 497 (3d Cir. 1999) (rejecting any non-remedial purpose) with *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003) (accepting non-remedial purpose in certain public employment contexts).

focus of the article will be on voluntary race, national origin, and gender-conscious plans in the private sector.

II. HISTORICAL EVOLUTION OF AFFIRMATIVE ACTION

Although the concept of legislating equal employment in the private sector may be traced back to various constitutional amendments,⁹ Reconstruction,¹⁰ and New Deal Era legislation,¹¹ the modern day concept of affirmative action evolved from the social unrest of the 1950s. During that decade, race relations became a societal flash point, leading to the reexamination of state sponsored segregation in *Brown v. Board of Education (Brown I)*.¹² In *Brown I*, the Court struck down the practice of racial segregation in public schools.¹³ The precise form of relief was left unanswered until *Brown II*,¹⁴ which ordered federal district courts to implement desegregation plans with “all deliberate speed.”¹⁵ Although the actual process of desegregation stretched out for decades, the *Brown* cases paved the way for broader social reform.

In 1961, President John F. Kennedy issued Executive Order 10925.¹⁶ This Order required federal agencies to “promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Fed-

9. U.S. CONST. amends. XIII (abolishing slavery), XIV, § 1 (establishing the Equal Protection clause under which “[n]o State shall . . . deny to any person within its jurisdiction equal protection of the laws”), and XV (awarding former slaves the right to vote).

10. During the Reconstruction Era, several pieces of legislation were passed to provide certain benefits to former slaves, including the Freedmen’s Bureau Act of 1866, ch. 200, 14 Stat. 173 (codified as 42 U.S.C. § 1981 (2000)), the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as 42 U.S.C. § 1982 (2000)) and the Civil Rights Act of 1871, ch. 22, § 2, 17 Stat. 13 (codified as 42 U.S.C. § 1985(3) (2000)).

11. During the Great Depression, several New Deal laws mandated a prohibition against racial discrimination in the selection of individuals for training and employment opportunities. For a detailed discussion of such legislation, see Michael K. Braswell et al., *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 367 n.6 (1993), and the citations therein. Moreover, on the brink of World War II, President Roosevelt issued Executive Order 8802, which prohibited defense contractors from discriminating on the basis of race, creed, color, or national origin and required employers and unions “to provide for the full and equitable participation of all workers in defense industries, without discrimination . . .” Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941). Most of these earlier forms of legislation, however, merely imposed a duty to ensure that minority workers were treated equally rather than imposing any affirmative obligations.

12. 347 U.S. 483, 492-93 (1954).

13. *Id.* at 494-95.

14. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

15. *Id.* at 301.

16. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

eral Government and on government contracts.”¹⁷ Executive Order 10925 required private businesses that had contracts with the federal government to take “affirmative action” to implement equal employment opportunity.¹⁸ However, the order did not state what steps constituted such affirmative action.

Three years later, Congress passed Title VII of the Civil Rights Act of 1964 (“Title VII”), which broadly extended the prohibitions against discrimination to covered private sector employers.¹⁹ Reasoning that economic and social conditions of women and minorities could be improved by providing equal opportunity in the workplace,²⁰ Congress prohibited private employers from discriminating against applicants or employees on the basis of race, color, national origin, sex, or religion with respect to employment decisions.²¹ It also established the Equal Employment Opportunity Commission (“EEOC”) to investigate and attempt to resolve discrimination complaints through informal settlement methods.²²

Encouraged by the passage of Title VII, President Lyndon B. Johnson issued Executive Order 11246 (“EO 11246”)²³ in 1965 to strengthen the affirmative action obligations for government contractors.²⁴ Like its predecessor, EO 11246 prohibited government contractors from discriminating against applicants and employees on the basis of race, creed, color, or national origin, and it required affirmative action to ensure compliance.²⁵ However, EO 11246 imposed more rigorous obligations by requiring each department and agency of the executive branch to adopt an affirmative action program (“AAP”).²⁶ Although EO 11246 did not set forth the necessary components of such programs, it appointed

17. *Id.*

18. *Id.* at § 301(1).

19. 42 U.S.C. §§ 2000e–2000e-17 (2000). Title VII originally applied to all employers with 25 or more employees. *See* Braswell, *supra* note 11, at 368 n.10 (citing 42 U.S.C. § 2000e-2 (1988)). As amended, however, it applies to employers with “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, subject to certain exceptions.” *Id.* § 2000e(b).

20. 29 C.F.R. § 1608.1(b) (2004).

21. 42 U.S.C. § 2000e-2(a).

22. *Id.* § 2000e-4.

23. Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965), *reprinted as amended in* 42 U.S.C. § 2000e (2000).

24. *Id.* § 202.

25. *Id.* § 101. In 1967, President Johnson expanded the list of protected categories under Executive Order 11246 to include women. Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).

26. Exec. Order No. 11246, 3 C.F.R. § 102.

the Civil Service Commission to assist the departments and agencies with the formulation of their programs and transferred power to the Secretary of Labor to oversee enforcement.²⁷

In 1970, the Office of Federal Contract Compliance Programs (“OFCCP”),²⁸ took two significant actions: (1) it issued a series of regulations defining affirmative action obligations for government contractors; and (2) it initiated enforcement programs encouraging private employers to implement numerical goals and timetables.²⁹ At this same time, the Department of Justice also began to seek affirmative action-type remedies in employment discrimination cases, including numerical goals and timetables.³⁰

Two years later, Congress amended Title VII by enacting the Equal Employment Opportunity Act.³¹ By empowering the EEOC to bring its own discrimination lawsuits in court,³² and providing federal courts with additional remedial authority,³³ the Act paved the way for widespread litigation by the EEOC and the Department of Justice.

In 1978, the EEOC issued a series of guidelines designed to assist private employers in developing their own AAPs.³⁴ These guidelines acknowledge that affirmative action arises primarily in three contexts: (1) affirmative action undertaken as a condition of receiving a federal gov-

27. *Id.* §§ 103, 201. In 1969, President Nixon issued Executive Order 11478, which required each department and agency in the federal government to establish and maintain AAPs for all civilian employees and applicants. Exec. Order No. 11,478, 34 Fed. Reg. 12985 (Aug. 8, 1969).

28. Originally, the OFCCP was named “Office of Federal Contract Compliance.” In 1975, it was renamed the OFCCP. In 1978, it assumed control of all federal agencies’ contracting programs. Exec. Order No. 12,086, 43 Fed. Reg. 46501 (Oct. 5, 1978), *reprinted as amended in* 42 U.S.C. § 2000e (2000).

29. Braswell, *supra* note 11 at 369-70. Pursuant to Executive Order 11246, the Department of Labor (“DOL”) issued the Philadelphia Plan in 1969. *Id.* at 369 n.19. That plan required all business bidding on federal assistance construction contracts in the Philadelphia area to establish and meet numerical goals and timetables for utilizing minority workers in local building trades. *Id.* For a detailed discussion on the Philadelphia Plan, see *id.* The Philadelphia Plan served as a blueprint for plans subsequently adopted by the DOL in other cities and for OFCCP regulations in this area. *See id.*; see also 41 C.F.R. §§ 60-2.1-60-2.18 (1971) (commonly known as “Order No. 4”).

30. *See, e.g.,* United States v. N.L. Indus., Inc., 479 F.2d 354, 380 (8th Cir. 1973) (ordering a one to one hiring ratio until fifteen African-Americans hold foremen positions); United States v. Hayes Int’l Corp., 456 F.2d 112, 121 (5th Cir. 1972) (modifying plan that permitted black employees to automatically transfer to any entry-level job and remanding for evaluation of back pay issue); United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir. 1971) (affirming lower court’s order to offer immediate job referrals to discriminates, apprenticeships with a ceiling requirement, and training committees to permit sufficient black applicants to overcome past discrimination).

31. 42 U.S.C. §§ 2000e-1-e-6, e-8-e-9, e-13-e-17 (2000).

32. *See id.* § 2000e-5(a).

33. *Id.* § 2000e-5(g).

34. *See* 29 C.F.R. § 1608 (2004).

ernment contract; (2) court-ordered affirmative action as a remedy for an employer's past discrimination; and (3) voluntary affirmative action taken by an employer.³⁵ Each of these areas is described in detail below.

III. AFFIRMATIVE ACTION AND GOVERNMENT CONTRACTS

The primary authority for affirmative action by federal government contractors is Executive Order 11246, as amended.³⁶ This Order requires federal government contractors and subcontractors to take affirmative action to ensure that applicants and employees are treated without regard to their race, color, religion, sex, or national origin.³⁷ Subsequent regulations and guidelines issued by the OFCCP require government contracts exceeding \$10,000 to include an equal opportunity clause affirming the contractor's commitment to take "affirmative action" measures to protect applicants and employees.³⁸ Such measures include recruiting women and minorities to apply for positions from which they have previously been excluded.³⁹ Under these regulations, all covered government contractors and subcontractors⁴⁰ must prepare and implement a written AAP, a term that is broadly defined as a "management tool designed to ensure [and institutionalize] equal employment opportunity."⁴¹

35. *See id.*

36. Exec. Order No. 11,246, 3 C.F.R. § 202 (1964-1965), *reprinted as amended in* 42 U.S.C. § 2000e. According to a 2002 OFCCP report, approximately 92,500 non-construction establishments and 100,000 construction establishments, employing nearly 26 million (22%) of the total civilian workforce, fall under its jurisdiction. EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, FACTS ON EXECUTIVE ORDER 11246 – AFFIRMATIVE ACTION, (Jan. 4, 2002), at <http://www.dol.gov/esa/regs/compliance/ofccp/aa.htm>.

37. Exec. Order No. 11,246, 3 C.F.R. § 101. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 and the Rehabilitation Act of 1973, which prohibit discrimination based on qualified veteran status and disability, respectively, also impose certain affirmative action requirements on federal government contractors. 38 U.S.C. § 4212(a) (2000); 29 U.S.C. § 793(a) (2000).

38. *See* 41 C.F.R. §§ 60-1.4(a), 1.5(a) (2004). Contractors are also required to include an equal employment opportunity clause in every subcontract unless explicitly exempt from compliance. *Id.* § 60-1.4(a)(7).

39. *Id.* §§ 60-20.6, 60.20.10(a)(1).

40. Specifically, all non-construction contractors or subcontractors with 50 or more employees are required to develop and maintain a written AAP for each of its establishments if: (1) it has a contract of \$50,000 or more; or (2) it has government bills of lading which are reasonably expected to total \$50,000 or more in any 12-month period; or (3) it serves as a depository of federal funds; or (4) it is a financial institution that is an issuing and paying agent for United States savings bonds and savings notes. *Id.* § 60-2.1(b). Construction contractors, on the other hand, are subject to the more lenient affirmative action requirements set forth in 41 C.F.R. §§ 60-4.1 through 60-4.9.

41. *Id.* §§ 60-2.10(a)(1), (3). In 2000, more than 107,414 establishments were required to have AAPs in place. *See* Government Contractors Affirmative Action Requirements; Final Rule, 65 Fed. Reg. 68,021, 68,041 (Nov. 13, 2000) (codified as 41 C.F.R. §§ 60-1-60-2).

Each AAP must include an analysis identifying any underutilization⁴² of qualified minorities and women in the contractor's workforce.⁴³ Where an underutilization is detected, the AAP must set forth placement "goals," timetables for achieving a balanced workforce, and an outline of programs to achieve those goals and timetables.⁴⁴ However, the implementing regulations caution that placement goals should not include quotas,⁴⁵ preferential treatment,⁴⁶ other set-asides, or be designed "to achieve proportional representation or equal results."⁴⁷ Minority status and gender may be considered as part of the employer's outreach process to broaden the pool of candidates, but government contractors are forbidden from making individual employment decisions based on race or gender. Rather, these decisions are subject to the same standards imposed for voluntary affirmative action as discussed below in section V.

Despite the OFCCP's prohibition on using AAPs to make individual employment decisions on the basis of race and gender, the imposition of race and gender-conscious programs by a government body rather than a private entity has raised questions under the Constitution. Although it has not expressly addressed the proper level of review under EO 11246, the Supreme Court has grappled with the general issue of race-conscious programs imposed by federal, state, and local governments.⁴⁸ In *Adarand Constructors, Inc. v. Peña*,⁴⁹ the Court held that *all*

42. An underutilization is described as a situation where "women and minorities are not being employed at a rate to be expected given their availability in the relevant labor pool." 41 C.F.R. § 60-2.10(a)(1). Whether a certain group is available depends on several factors, including, but not limited to the presence of qualified minorities and women in an area in which the contractor may reasonably recruit. *See id.* § 60-2.10(a)(2).

43. *Id.* § 60-2.15(b).

44. *See id.* § 60-2.16(a).

45. *Id.* § 60-2.16(e)(1) ("Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden").

46. *Id.* § 60-2.16(e)(2).

47. *Id.* § 60-2.16(e)(1)-(3). For a detailed discussion on the OFCCP's position on numerical goals, see EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, NUMERICAL GOALS UNDER EXECUTIVE ORDER 11246, (Aug. 2, 1995), at <http://www.arthurhu.com/97/06/ofccp.htm> [hereinafter NUMERICAL GOALS].

48. *See, e.g.,* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court held that state and local government programs employing racial classifications were subject to strict scrutiny. *Id.* at 477, 495. However, in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court found that federal programs employing such classifications were subject to intermediate scrutiny, a more lenient standard. *Id.* at 564-65. Intermediate scrutiny simply requires that the minority program serve an important government objective, such as furthering diversity, and be substantially related to that objective. *See id.* at 566.

government race-conscious programs, whether federal, state, or local, must satisfy the strict scrutiny standard of review.⁵⁰ To comport with the Constitution, an AAP must: (1) serve a compelling government interest; and (2) be narrowly tailored to serve that interest.⁵¹ Generalized findings of past societal discrimination against a protected class or an employer's "good intentions," without more, were deemed insufficient to establish a "compelling" interest.⁵²

Although *Adarand* involved minority set-aside programs, the Court's broad holding purports to challenge the validity of the OFCCP's affirmative action regulations since they uniformly apply to all covered government contractors without regard to their prior history of discrimination.⁵³ However, the OFCCP takes the position that *Adarand* does not apply to government contractors' obligations under EO 11246 because the regulations do not impose preferences or quotas.⁵⁴ Instead, its goal-setting process is "designed to measure the success of contractors' good-faith efforts at broadening the pool of qualified candidates"⁵⁵ Whether the courts will adopt the OFCCP's interpretation, however, remains to be seen because most cases either settle or are resolved within the OFCCP's administrative regime.

Apart from the appropriate standard of review, other legal issues have arisen primarily due to the interplay between the Executive Order and Title VII. Indeed, EO 11246's imposition of affirmative action obligations appears to clash with Title VII's prohibition on discrimination. The EEOC regulations address this potential conflict by creating a sepa-

49. 515 U.S. 200 (1995).

50. *Id.* at 227. *Adarand* did not address the proper level of review under Executive Order 11246; rather, it dealt with the federal government's practice of giving general contractors financial incentive to hire disadvantaged contractors and the use of race-based presumptions to identify such individuals. *Id.* at 204.

51. *Id.* at 227.

52. *See, e.g., Wygant*, 476 U.S. at 274, 276; *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting).

53. *See Adarand*, 515 U.S. at 227. In the wake of *Adarand*, the Clinton administration issued a memorandum directing all federal agencies to evaluate their programs for compliance and cautioned that the only widely-recognized "compelling" government interest was remedying past, identifiable race discrimination. *See* Memorandum from Walter Dellinger, to the General Counsels (June 28, 1995) available at <http://clinton2.nara.gov/WH/EOP/OP/html/aa/ap-b.html>.

54. *See Affirmative Action and the Office of Federal Contract Compliance: Hearing of the Committee on Labor and Human Resources Before the United States Senate*, 104th Cong. 4 (1995) (OFCCP statement of Shirley J. Wilcher, Deputy Assistant Secretary for Federal Contract Compliance, Employment Standards Administration, United States Department of Labor) [hereinafter *Hearing of the Committee on Labor and Human Resources*]; *see also* Numerical Goals, *supra* note 47.

55. *Hearing of the Committee on Labor and Human Resources*, *supra* note 54.

rate process for investigating complaints involving AAPs adopted pursuant to EO 11246.⁵⁶ Under Title VII and the EEOC regulations, government contractors are granted a safe harbor if its challenged actions were taken pursuant to a Department of Labor-approved AAP or in good faith reliance of the guidelines.⁵⁷

IV. COURT-IMPOSED AFFIRMATIVE ACTION

Federal and state courts may require private employers to engage in affirmative action as a remedy for past discrimination under Title VII.⁵⁸ Judicial remedies for discriminating against protected individuals under Title VII include the establishment of numerical goals and timetables for hiring and promotions. However, a court's imposition of race, national origin, or gender-based goals raises issues under both Title VII and the Constitution.

The Supreme Court first squarely addressed these issues in *Local 28, Sheet Metal Workers' International Ass'n v. EEOC*.⁵⁹ The Court de-

56. See 29 C.F.R. § 1608.5(a) (2004) ("The commission will investigate whether the AAP was adopted by a person and pursuant to the order and whether adherence to the program was the basis of the complaint."). In fact, Section 718 of Title VII prohibits the denial, termination, or suspension of a federal contract on the grounds of employment discrimination without a full hearing if the employer has adopted a government-approved AAP. 42 U.S.C. § 2000e-17 (2000).

57. Under 29 C.F.R. § 1608, the EEOC will investigate to determine whether the AAP was adopted by a contractor subject to Executive Order 11246, pursuant to the Order, and whether it is the basis of the Title VII complaint. 29 C.F.R. § 1608.5(a) (2004). If so, and the AAP is current and government-approved, the EEOC will issue a "no reasonable cause" determination on the Title VII charge. *Id.* § 1608.5(a)(1). A similar determination will be issued if the AAP was not previously approved but nevertheless conforms to the federal regulations, as determined by the EEOC or the Department of Labor. *Id.* § 1608.5(a)(2). If the program is not subsequently approved, but the contractor adopted the AAP in good faith reliance on these guidelines, the EEOC may also issue a no cause determination entitling the contractor to assert certain defenses. *Id.* § 1608.5(b). This type of no cause determination, which is considered a written interpretation or opinion of the EEOC, provides the employer with a defense for at least monetary liability. 42 U.S.C. § 2000e-12(b)(1); 29 C.F.R. § 1608.2.

58. 42 U.S.C. § 2000e-5(g)(1).

59. 478 U.S. 421 (1986) (plurality decision). *Sheet Metal Workers' v. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). *Stotts* involved a consent decree between the City of Memphis and its firefighter union after a class of African-American firefighters filed suit for race discrimination. *Id.* at 565. Subsequently, the city announced plans to layoff personnel based on its seniority system, which resulted in the inclusion of those African-American firefighters hired pursuant to the consent decree. *Id.* at 566. The district court enjoined the layoffs and granted the African-American firefighters seniority status. *Id.* at 566-67. The Supreme Court reversed, holding that the district court exceeded its authority under the consent decree and Title VII because there was no finding of actual discrimination. *Id.* at 579. In dictum, the Court intimated that Title VII permits courts to grant "make-whole relief only to those who have been actual victims of illegal discrimination . . ." *Id.* at 580.

terminated that Title VII “does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination.”⁶⁰ The Court held that race-conscious relief may be used “where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination.”⁶¹ In determining the holding in this case, the Court analyzed the Sheet Metal Workers’ affirmative action plan. Under the Court’s analysis, there are several factors in determining the propriety of an affirmative action program that uses numerical goals, including: (1) whether it is flexible, temporary and used only as long as necessary to remedy past discrimination; and (2) whether it does not “unnecessarily trammel the interests of white employees.”⁶² The Court also rejected a challenge on constitutional grounds to the use of affirmative action as a judicially-imposed remedy for past discrimination under Title VII.⁶³ Without deciding the appropriate standard of review, the Court held that the lower court’s relief passed the most rigorous standard of strict scrutiny.⁶⁴ The Court determined that the lower court’s relief was also narrowly tailored to serve the government’s compelling interest in remedying past discrimination.⁶⁵

In *United States v. Paradise*,⁶⁶ the Supreme Court applied these principles in affirming a district court’s order that the Alabama Department of Public Safety promote black and white state troopers on a one-to-one ratio for “a period of time.”⁶⁷ The Court considered several factors in reaching its decision, including: “[1] the necessity for the relief and the efficacy of alternative remedies; [2] the flexibility and duration of relief . . . [3] the relationship of the numerical goals to the relevant labor market; and [4] the impact of the relief on the rights of third par-

60. *Sheet Metal Workers’*, 478 U.S. at 445. In reaching this conclusion, the Court determined that court-ordered race conscious relief was consistent with the statutory language, broad purposes, and legislative history of Title VII. *Id.* at 445-65. The Court was also persuaded by the fact that the racial preferences and quotas served as a remedy, rather than a proactive means to maintain racial balance in the workforce. *Id.* at 463-64.

61. *Id.* at 445.

62. *Id.* at 477-79.

63. *Id.* at 480.

64. *See id.*

65. *Id.*

66. 480 U.S. 149 (1987).

67. *Id.* at 163, 166.

ties.”⁶⁸ Based on these factors, the Court concluded that the promotion ratio met the requirements of the Fourteenth Amendment.⁶⁹

Although both *Sheet Metal Workers’* and *Paradise* make clear that a court may impose race-conscious relief under Title VII and the Constitution, such relief does not operate as an absolute defense to a Title VII claim for reverse discrimination. Whether court-ordered affirmative action plans insulate an employer from reverse discrimination liability depends on a case-by-case analysis of the *Paradise* factors.⁷⁰

V. VOLUNTARY AFFIRMATIVE ACTION

The vast majority of affirmative action programs in the United States do not fall into either the government contract or court-ordered categories. Rather, most initiatives are voluntary efforts implemented by employers to further equal opportunity. Such voluntary efforts result in an obvious tension with Title VII’s prohibitions on discrimination. Title VII’s literal language imposes liability for discrimination against any person on the basis of race, color, religion, sex, or national origin⁷¹ which contrasts with Congress’ intent to encourage voluntary action by employers in creating employment opportunities for minorities and women, which may include preferential treatment of one race or gender of employees over another.⁷²

68. *Id.* at 171 (citing *Sheet Metal Workers’*, 478 U.S. at 481 (Brennan, J., plurality opinion), 486 (Powell, J., concurring in part and concurring in judgment)).

69. *See id.* at 185-86.

70. Although the implementing regulations state that “actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII [sic],” 29 C.F.R. § 1608.8, the Supreme Court held in *Martin v. Wilks*, 490 U.S. 755, 762 (1989), that such decisions must be made on a case-by-case basis – a fact acknowledged by the EEOC in a subsequent policy guidance. *Id.* at 762; *see also Anderson v. Rice*, Appeal No. 01902182, 1990 WL 1108935, at *7 (E.E.O.C. Aug. 29, 1990) for a discussion of the EEOC’s interpretation of *Martin*. In response to these decisions Congress passed the Civil Rights Act of 1991. That act prohibits challenges to the entry of a court order or judgment by:

(1) a person who, prior to the entry of the judgment or order . . . [had] actual notice of the proposed judgment or order sufficient to apprise [him that the] judgment or order might adversely affect [his interests and legal rights, and] an opportunity was available to present objections . . . by a future date certain; [and there was] a reasonable opportunity to present objections to such judgment or order; or (2) a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

42 U.S.C. § 2000e-2(n) (2000).

71. *Id.* at § 2000e-2.

72. 29 C.F.R. § 1608.1(a) (2004).

A. EEOC Regulations

The EEOC promulgated guidelines in 1979 in an attempt to resolve the tension.⁷³ Those guidelines make clear that Congress did not intend to expose employers who comply with Title VII to reverse discrimination liability.⁷⁴ Finding that voluntary action must be encouraged, the EEOC delineated three circumstances under which an employer may voluntarily adopt an affirmative action program: (1) an analysis reveals that existing or contemplated employment practices are likely to cause an actual or potential adverse impact; (2) a comparison between the employer's workforce and the appropriate labor pool reveals that it is necessary to correct the effects of prior discriminatory practices; and (3) a limited labor pool of qualified minorities and women for employment or promotional opportunities exists due to historical restrictions by employers, labor organizations, or others.⁷⁵ The guidelines set forth the three elements that must be included in any AAP.⁷⁶ Notably, the guidelines provide a safe harbor for employers who implement an AAP that is adopted in good faith, in conformity with, and in reliance upon, these guidelines.⁷⁷ Thus, compliance with the guidelines entitles employers to an absolute defense against any Title VII action where an employment decision was made pursuant to an AAP.⁷⁸ The Supreme Court has not yet determined whether the EEOC guidelines are entitled to deference by the courts, and they are rarely cited in litigation on this topic.⁷⁹ Rather, the law in this area has been shaped by Supreme Court jurisprudence.⁸⁰

73. *Id.*

74. *Id.*

75. *Id.* § 1608.3(a)–(c).

76. *Id.* § 1608.4. A valid AAP must contain three elements: (1) a reasonable self-analysis, (2) a reasonable basis for concluding that action is appropriate, and (3) reasonable action. *Id.*

77. *See id.* § 1608.2, 1608.10(b). The guidelines provide that if an employer asserts that a certain action was taken in reliance on an AAP, the EEOC will determine if the assertion is true. *Id.* § 1608.10(b). If the AAP complies with the regulations, the EEOC will issue a no cause determination stating, where appropriate, that the determination constitutes a written interpretation or opinion from the Commission under Section 713(b) of Title VII. *Id.* § 1608.2. In turn, Section 713(b) provides that no Title VII liability results from an employer's good faith reliance on or adherence to "any written interpretation or opinion of the Commission." 42 U.S.C. § 2000e-12(b)(1) (2000).

78. 42 U.S.C. § 2000e-12(b)(1) (2000).

79. LEX. K. LARSON, EMPLOYMENT DISCRIMINATION § 62.07 (Matthew Bender & Co. 2d ed. 2003).

80. *See id.* Thus, the regulations operate primarily to assure employers that they can engage in certain voluntary AAPs without fear of a reverse discrimination suit initiated by the EEOC. *Id.*

*B. The Validity of Voluntary Affirmative Action Plans
With a Remedial Purpose*

Shortly after issuance of the EEOC's regulations, the Supreme Court decided the first case involving the permissible contours of voluntary affirmative action plans in the private sector. In *United Steelworkers of America v. Weber*,⁸¹ the Supreme Court addressed a voluntary affirmative action plan designed to eliminate conspicuous racial imbalances in the company's craft workforce by reserving fifty percent of its in-plant craft-training program openings for African-American employees until their percentages reached a level proportionate with the percentage of African-Americans in the local labor force.⁸² Adoption of this plan led to a number of African-American employees being selected over more senior white employees.⁸³ A white employee challenged the plan under Title VII.⁸⁴

The Supreme Court rejected this reverse discrimination claim, holding that Title VII's prohibition against racial discrimination does not proscribe, under certain circumstances, voluntary race-conscious affirmative action.⁸⁵ In reaching this conclusion, the Court found that Congress never intended to prohibit private employers from implementing programs that mimicked Title VII's remedial goal of eradicating discrimination and its effects from the workplace.⁸⁶ Although the Court refused to define the "line of demarcation" between permissible and impermissible affirmative action plans,⁸⁷ it listed several critical factors to be considered, including whether the plan: (1) mirrors Title VII's statutory purpose by "break[ing] down old patterns of racial segregation and hierarchy" in "occupations which have been traditionally closed to [minorities];" (2) "unnecessarily trammels" the interests, or serves as an absolute bar to the advancement, of non-minority employees; and (3)

81. 443 U.S. 193 (1979).

82. *Id.* at 199.

83. *See id.*

84. *Id.* at 199-200.

85. *Id.* at 209.

86. *Id.* at 204. As the Court stated:

It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id.; *see also* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) ("In order to get beyond racism, we must first take account of race. There is no other way.").

87. *Weber*, 443 U.S. at 208.

serves as a temporary measure and is intended to eliminate racial imbalance rather than maintain it.⁸⁸

In *Weber*, the employer's voluntary efforts satisfied these requirements because they were designed to correct a conspicuous racial imbalance in traditionally segregated job categories. The Court also held that the interests of white workers were not "unnecessarily trammled" because the plan: (1) did not require that white employees be discharged and replaced with new black hires; (2) did not "create an absolute bar to the advancement of white employees" since half of those trained would be white; and (3) was a temporary measure intended to eliminate a "manifest racial imbalance" rather than maintain it.⁸⁹

The Court extended *Weber* to cover gender-based preferences in *Johnson v. Transportation Agency, Santa Clara County*.⁹⁰ In *Johnson*, the agency adopted an affirmative action plan that took into account the gender of qualified applicants as one factor in making promotional decisions within a traditionally male dominated job classification.⁹¹ Although the case involved a governmental entity, the Court's analysis was based exclusively on Title VII and did not address any of the constitutional issues.⁹² *Johnson* is also significant because it fleshed out the evidentiary standards for demonstrating the existence of a valid plan. First, the Court reaffirmed that "an employer seeking to justify the adoption of a [voluntary affirmative action] plan need not point to its own prior discriminatory practices, nor even evidence of an 'arguable violation' on its

88. *See id.* Identical standards also have been applied to cases arising under Title VII consent decrees as well as section 1981 cases. *See, e.g.,* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 517-18, 525 (1986) (validity of race-conscious relief contained in consent decrees under Title VII is judged by same standards as in *Weber*); Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 498-99 (3d Cir. 1999) ("While a valid affirmative action plan serves as a defense to an action under section 1981, the standard for evaluating the validity of a plan is identical to the standard developed in Title VII cases."); Setser v. Novack Inv. Co., 657 F.2d 962, 966-67 (8th Cir. 1981) ("[T]he Supreme Court, by approving race-conscious affirmative action [plans] by employers in *Weber*, implicitly approved the use of race-conscious plans to remedy past discrimination under section 1981.").

89. *Weber*, 443 U.S. at 208. Although these three factors are most often cited in determining whether non-minority rights have been unduly infringed, at least one court has held that, without further elucidation, these factors were not the only impermissible actions against employees' interest under the unnecessary trammeling test. *See Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1016 (D.C. Cir. 1981).

90. 480 U.S. 616 (1987).

91. *Id.* at 621-22.

92. *Id.* at 627 n.6 (finding that their decisions must be guided by their decisions in *Weber*. Justice Scalia in his dissent in *Weber* states "the obligations of a public employer under Title VII must be identical to its obligations under the Constitution . . .").

part.”⁹³ Rather, it need point only to a “conspicuous . . . imbalance in traditionally segregated job categories.”⁹⁴ Second, it established that “a comparison of the percentage of minorities or women in the employer’s work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise”⁹⁵ In contrast, where jobs require special training, the proper “comparison should be with those in the labor force who possess the relevant qualifications.”⁹⁶ In requiring proof of a manifest imbalance, the interests of those employees not benefiting from the plan are not to be unduly impaired.⁹⁷

Applying this newly-detailed framework, the *Johnson* Court determined that the plan satisfied the *Weber* criteria.⁹⁸ First, the plan (1) was designed to correct a manifest gender imbalance in certain skilled job categories where women were traditionally underrepresented as compared to the area labor pool; (2) contained reasonable aspirations, not quotas, in correcting imbalances in the agency’s workforce; and (3) did not authorize blind hiring but directed that the agency consider numerous factors, including gender, in making employment decisions.⁹⁹ The plan also satisfied *Weber*’s second and third criteria - which preclude the unnecessary trammeling of male employees’ rights and a plan that is not temporary in nature - because, rather than setting aside specific positions for women, the plan required women to compete with all other applicants.¹⁰⁰ Thus, “[n]o persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants.”¹⁰¹ Moreover, the “denial of the promotion unsettled no legitimate, firmly rooted expectation on the part of” male employees since the plan authorized the selection of any of the candidates deemed

93. *Id.* at 630 (citing *Weber*, 443 U.S. at 212 (Blackmun, J., concurring)).

94. *Id.*

95. *Id.* at 631-32. The Court distinguished this comparison with the “prima facie” standard which requires comparison with the percentage of minorities or women qualified for the job at issue. *Id.* at 633 n.10. The Court further noted that, in some cases, the “manifest imbalance may be sufficiently egregious to establish a prima facie case,” but even a less striking statistical disparity could support a voluntary affirmative action plan without proof of the additional non-statistical evidence of past discrimination required to establish a prima facie case. *Id.* at 633 n.11.

96. *Id.* at 632.

97. *See id.*

98. *See generally id.* at 634-39 (examining the three criteria of *Weber* and determining whether the new framework of *Johnson* satisfied the three criteria).

99. *Id.* at 634-35, 637.

100. *Id.* at 638.

101. *Id.*

qualified.¹⁰² Finally, the Court found that the plan was only temporary and adjusted annually to provide a reasonable guide for actual employment decisions.¹⁰³

Following *Weber* and *Johnson*, the vast majority of cases addressing voluntary affirmative action plans have arisen in the context of public, not private, employers who face challenges of reverse discrimination under both Title VII and the Fourteenth Amendment.¹⁰⁴ Moreover, these cases, as well as the handful of private employer cases, have sought, with rare exception, to justify racial, ethnic, or gender preferences pursuant to voluntary affirmative action plans based on the *remedial* nature of the plan. The private sector cases in general are unacceptable in that they simply apply the *Weber* and *Johnson* purpose, impact, and duration standards to determine whether the employer has met its burden.¹⁰⁵ As

102. *Id.*

103. *Id.* at 641.

104. Although the employer at issue in *Johnson* was a public agency, the plaintiff failed to raise any constitutional issue. *Id.* at 620 n.2. The Court noted that “where the issue is properly raised, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause.” *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)). This article does not attempt to address constitutional standards beyond noting that affirmative action cases arising under the Equal Protection Clause, which guarantees that citizens will be treated “as individuals, not as simply components of a racial, religious, sexual or national class,” are subject to more restrictive standards than those arising under Title VII. *Compare* *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citations and internal quotation marks omitted) (Equal Protection Clause) *with* *Johnson v. Transp. Agency Santa Clara County*, 480 U.S. 616 (1987) (Title VII). As previously noted, the applicable constitutional standard for analyzing voluntary programs that create preferences based on race and/or ethnicity is strict scrutiny, which requires a showing that the affirmative action program is (1) based on a compelling governmental interest, and (2) narrowly tailored to achieve that interest. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *see also* *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) (the “remedial” justification requires proof both of past discrimination by the employer and that the remedy is narrowly tailored to the violation – *i.e.*, “it discriminates against whites as little as possible consistent with effective remediation.” (citations omitted)).

105. *Compare, e.g.*, *Dix v. United Airlines, Inc.*, No. 00-3513, 2001 U.S. App. LEXIS 3225, at *5 (7th Cir. Feb. 22, 2001) (upholding affirmative action plan that waived bilingual requirements for African-Americans applying for flight attendant positions where the company offered sufficient evidence of historic racial imbalances, and the plan “did not hinder white employees because they could take part in other open-house interviews that did not impose a bilingual requirement.”); *and* *Tangren v. Wackenhut Servs., Inc.*, 658 F.2d 705, 706-07 (9th Cir. 1981) (extending *Weber* in upholding voluntary affirmative action plan that contained a seniority override for layoffs in favor of minority and female employees in light of evidence that: (1) the seniority system adversely impacted minorities and women; and (2) the plan did not unnecessarily trammel non-minority employee rights because seniority rights were not vested, and, thus, did not unduly abridge employee expectations, and the nature and duration of the plan were carefully crafted to minimize its impact on non-minorities) *with* *Frost v. Chrysler Motor Corp.*, 826 F. Supp. 1290, 1292, 1296, 1298 (W.D. Okla. 1993) (affirmative action plan that gave a minority association the right of first refusal over certain dealerships and the right to bar the hiring of a qualified white applicant even in the absence of an available minority applicant deemed invalid because (1) the company failed to produce any

discussed below, whether a *non-remedial* purpose could ever justify preferential treatment by a private employer has yet to be fully resolved.

*C. The Validity Of Voluntary Affirmative Action Plans With
A Non-Remedial Purpose*

1. Historical Cases Addressing Non-Remedial Purposes

Although Justice Steven's concurrence in *Johnson* recognized the possibility that something other than "manifest imbalance" could justify preferential treatment, the Supreme Court has not addressed whether a private employer's voluntary affirmative action plan could be supported by a non-remedial purpose.¹⁰⁶ The sole opinion to date involving a private employer has answered this question in the negative. In *Schurr v. Resorts International Hotel, Inc.*,¹⁰⁷ the Third Circuit held that under Title VII, a private employer's affirmative action plan is required "by controlling precedent" to have a remedial purpose – *i.e.*, it "must be designed to correct a 'manifest imbalance in traditionally segregated job categories.'"¹⁰⁸ The plaintiff, a white male, alleged that the company violated Title VII by making race a factor in its decision to hire an equally well-qualified minority applicant pursuant to its affirmative action plan.¹⁰⁹ The court found that the plan, and the state regulations mandating the plan, were deficient because they "were not based on any finding of historical or then-current discrimination in the casino industry or in the technician job category; [and] the plan was not put in place as a

evidence of manifest imbalance (*i.e.*, comparing the percentage of black persons possessing the necessary qualifications for ownership with the percentage of dealerships owned by blacks); and (2) the plan unnecessarily trammled non-minority rights by barring non-minorities from consideration even when there are no qualified black candidates).

106. In his concurring opinion in *Johnson*, Justice Stevens emphasized that "the opinion does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups" and intimated that preferences might be valid "for any reason that might seem sensible from a business or social point of view" including diversity. 480 U.S. at 642, 645 (Stevens, J., concurring). In her separate concurrence, Justice O'Connor explicitly rejected this view by reading *Weber* as "permitting affirmative action only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination." *Id.* at 649 (O'Connor, J., concurring).

107. 196 F.3d 486 (3d Cir. 1999).

108. *Id.* at 497 (quoting *United Steelworkers of America v. Weber*, 443 U.S. 193, 207 (1979)).

109. *Id.* at 488, 490.

result of any manifest imbalance or in response to a finding that any relevant job category was or ever had been affected by segregation.”¹¹⁰

Prior to *Schurr*, three circuit courts in cases involving public employees were split on whether a non-remedial purpose could justify preferential treatment under Title VII and/or the Equal Protection Clause of the Fourteenth Amendment. First, in *Cunico v. Pueblo School District No. 60*,¹¹¹ the Tenth Circuit held that although the level of proof differed under Title VII and the Fourteenth Amendment, “[t]he purpose of race-conscious affirmative action must be to remedy the effects of past discrimination against a disadvantaged group that itself has been the victim of discrimination.”¹¹² Applying this standard, the court upheld a claim of reverse discrimination where the employer chose to retain the only black administrator in its district based on a plan whose goals included the achievement of (1) “a diverse, multi-racial faculty and staff”; and (2) “equity for all individuals through equal employment opportunity policies and practices.”¹¹³ The court held that such goals were invalid under either Title VII or an equal protection analysis because there was no showing that such goals were necessary to remedy past discrimination.¹¹⁴

Six years later, in *Taxman v. Board of Education*,¹¹⁵ the Third Circuit addressed whether a public employer’s desire to promote racial diversity could constitute a basis for granting a racial, ethnic, or gender preference. The court unequivocally held that Title VII does not permit “an employer with a racially balanced work force to grant a *non-remedial* racial preference in order to promote ‘racial diversity.’”¹¹⁶ Ap-

110. *Id.* at 497-98.

111. 917 F.2d 431 (10th Cir. 1990).

112. *Id.* at 437.

113. *Id.* at 435-36, 437 n.3.

114. *See id.* at 434-40. In addition, the court found that the employment decision unnecessarily trammelled the rights of non-minority employees (in violation of Title VII) and was not narrowly tailored (in violation of the Equal Protection Clause) because: (1) the position at issue “was earmarked for a black person to the exclusion of all other qualified persons”; (2) the plaintiff’s seniority entitled her to the position; and (3) “the District’s decision, which by its own terms was made to ensure employment of at least one black administrator, was intended to maintain rather than achieve a particular racial balance.” *Id.* at 440.

115. 91 F.3d 1547 (3d Cir. 1996).

116. *Id.* at 1549-50 (emphasis added). The employer’s plan provided that, “[i]n all cases, the most qualified candidate will be recommended for appointment. However, when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended.” *Id.* at 1550 (internal citations omitted). The policy was not adopted to remedy past discrimination or current underutilization; rather, relevant statistics demonstrated that “the percentage of Black employees in the job category which included teachers exceeded the percentage of Blacks in the available workforce.” *Id.* at 1550-51. The employer applied the above policy to deter-

plying *Weber*, the court analyzed whether the racial diversity purpose of the affirmative action plan mirrored the purposes of Title VII.¹¹⁷ The court determined that “Title VII was enacted to further two primary goals: to end discrimination on the basis of race, color, religion, sex or national origin, thereby guaranteeing equal opportunity in the workplace, and to remedy the segregation and under[-]representation of minorities that discrimination has caused in our Nation’s work force.”¹¹⁸ The court emphasized the remedial component of Title VII as critical to the entire anti-discrimination statute.¹¹⁹

In sharp contrast, in an equal protection case decided the same year as *Taxman*, the Seventh Circuit in *Wittmer v. Peters*,¹²⁰ rejected the plaintiffs’ contention that “the *only* form of racial discrimination that can survive strict scrutiny is discrimination designed to cure the ill effects of

mine which of two equally qualified teachers would be laid off from the teaching staff in the Business Department of one of the employer’s high schools. *Id.* at 1551. State law dictated that layoffs would proceed based on reverse order of seniority and both candidates – a black female and a white female – had equal seniority having started their positions on the same day nine years prior to the layoff. *Id.* In prior circumstances involving two candidates with identical seniority, the employer had used a random process (*e.g.*, drawing numbers, lots or having a lottery) to break a tie. *Id.* In the past, these situations had never involved employees of different races. *Id.* Because of this racial difference, the employer decided to invoke the affirmative action plan and retain the minority teacher who was the only minority among the teaching staff in the Business Department. *Id.* As part of this process, the employer also reviewed class room performance, evaluations, volunteerism and certificates and determined that both candidates had equal abilities and qualifications. *Id.* In explaining the basis for retaining the minority teacher, the employer stated:

it was sending a very clear message that we feel that our staff should be culturally diverse, our student population is culturally diverse and there is a distinct advantage to students, to all students, to be made – come into contact with people of different cultures, different background, so that they are more aware, more tolerant, more accepting, more understanding of people of all background.

Id. at 1552.

117. *Id.* at 1556.

118. *Id.* at 1557.

119. *Id.* at 1557-58. The court found that:

[t]he significance of this second corrective purpose cannot be overstated. It is only because Title VII was written to eradicate not only discrimination per se but the *consequences* of prior discrimination as well, that racial preferences in the form of affirmative action can co-exist with the Act’s antidiscrimination mandate.

Thus, based on our analysis of Title VII’s two goals, we are convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and, therefore, cannot satisfy the first prong of the *Weber* test. . . . *Here, there is no congressional recognition of diversity as a Title VII objective requiring accommodation.* . . . While the Court in *Weber* and *Johnson* permitted some deviation from the antidiscrimination mandate of the statute in order to erase the effects of past discrimination, these rulings do not open the door to additional non-remedial deviations.

Id. (emphasis added).

120. 87 F.3d 916 (7th Cir. 1996).

past discrimination”¹²¹ Although the court acknowledged that there was dicta to this effect, it stated that, “[a] judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him.”¹²² The court held that the sweeping dicta of other cases had to be reviewed in context, which did not include the unusual circumstances presented by the case at hand.¹²³ Specifically, the court held that the selection of a black applicant over white applicants for the position of lieutenant in a boot camp for young prisoners did not violate the Equal Protection Clause because the camp administrators’ consideration of race was justified by the unique goal of reformation in the experimental correction program.¹²⁴ While *Wittmer* serves as a precursor to a non-remedial approach under the Equal Protection Clause in the law enforcement context,¹²⁵ it is hardly a run-of-the-mill employment case, and would likely have little impact on private employers in the Title VII context.

2. The Supreme Court’s 2003 Decisions Opened the Door to Diversity as a Valid Rationale for Preferential Treatment in the University Admissions Context

In 2003, the Supreme Court decided two cases involving student admissions at the University of Michigan.¹²⁶ These decisions may have implications beyond the University context, much like the admissions case before them, *Regents of the University of California v. Bakke*.¹²⁷ In *Gratz* and *Grutter*, the Court endorsed the position that “student body

121. *Id.* at 919. Although this case did not involve a challenge under Title VII, its holding arguably applies with equal force given that the constitutional standards are stricter than those under Title VII. *See supra* note 104.

122. *Wittmer*, 87 F.3d at 919.

123. *See id.*

124. *See id.* at 920-21. The court’s conclusion was reinforced by evidence from defendant’s experts that “the boot camp . . . would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots.” *Id.* at 920. The court distinguished this argument from the “role model” argument for reverse discrimination previously rejected by the Supreme Court. *Id.* at 919-20. As the court noted: [w]e doubt that many inmates of boot camps aspire to become correctional officers. . . . In any event that is not the justification advanced. The black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp. *Id.* at 920.

125. *See Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003).

126. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

127. 438 U.S. 265 (1978).

diversity is a compelling state interest that can justify the use of race in university admissions.”¹²⁸ In reaching this conclusion, the Court first noted that, in applying the strict scrutiny analysis to race-based governmental action, context matters.¹²⁹ Despite language in prior decisions that could be read to suggest that remedying past discrimination is the sole permissible justification for race-based governmental action, the Court noted that it has “never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”¹³⁰ The Court stated that “the Law School’s educational judgment that such diversity is essential to its educational mission is [entitled to deference].”¹³¹ In addition, the Court viewed the obtainment of diversity as at “the heart of the Law School’s proper institutional mission,” and that, absent a contrary showing, the university enjoys a presumption of “good faith.”¹³² The Court also held that the law school’s desire to enroll a “critical mass” of minority students to fulfill its goal of “assembling a class that is both exceptionally academically qualified and broadly diverse” does not constitute unconstitutional racial balancing.¹³³ Rather, the

concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. . . . [such as] cross-racial understanding [that] helps to break down racial stereotypes and enables [students] to better understand persons of different races. These benefits are ‘important and laudable’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’¹³⁴

The Court also pointed to the amici brief of research associations, major American businesses, and high-ranking military officers to support the conclusions that student body diversity: (1) “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals”; and (2) is necessary to a) “the skills needed in today’s increasingly global marketplace”; and b) “the military’s ability to fulfill its principle mission to provide national secu-

128. *Grutter*, 539 U.S. at 325; see *Gratz*, 539 U.S. at 268 (adopting *Grutter* analysis).

129. *Grutter*, 539 U.S. at 327.

130. *Id.* at 328.

131. *Id.*

132. *Id.* at 329 (citing *Bakke*, 438 U.S. at 318-19).

133. *Id.* at 329-30 (citations omitted).

134. *Id.* at 330.

ity.”¹³⁵ Since education serves as the foundation to “sustaining our political and cultural heritage,” and is, indeed, the “very foundation of good citizenship,” the Court deemed it critical that everyone regardless of race or ethnicity should have an opportunity for higher education.¹³⁶ Finally, the Court noted that because universities and law schools constitute the primary training ground for the majority of our nation’s leaders, a diverse student body is necessary to establish leaders in the eyes of the citizens of America.¹³⁷

The two cases diverged, however, regarding the legitimacy of the means chosen to accomplish the compelling state interest that “must be specifically and narrowly framed to accomplish that purpose.”¹³⁸ The undergraduate admissions system at issue in *Gratz* was essentially a non-flexible quota system that automatically assigned one-fifth of the hundred points necessary to admission to each minority applicant solely based on race.¹³⁹ The Court held that this approach did not survive strict scrutiny because it did not involve the necessary individualized considerations originally set forth in *Bakke*.¹⁴⁰ In contrast, the law school admissions process in *Grutter* passed constitutional muster because it provided that race could be only “a ‘plus’ factor in the context of individualized consideration of each and every applicant.”¹⁴¹

3. Post-*Grutter* Decisions in the Employment Context

The important question following *Grutter* and *Gratz* is whether diversity¹⁴² can serve as the necessary predicate for justifying preferential treatment in the private sector employment context under Title VII.¹⁴³ As previously discussed, Title VII to date has been construed to justify affirmative action only where there is evidence of past discrimination or a manifest imbalance in the work force. Will the courts go one step further to find that Congress’ goal of equal employment also permits preferen-

135. *Id.* at 330-31 (citations omitted).

136. *Id.* at 331 (citations omitted).

137. *Id.* at 332.

138. *Id.* at 333 (citing *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

139. *Gratz*, 539 U.S. at 256, 270 (finding the automatic one-fifth increase is not narrowly tailored to achieve the interest in education diversity).

140. *Id.* at 271-72.

141. *Grutter*, 539 U.S. at 334.

142. “The word ‘diversity,’ like any another abstract concept, does not admit of permanent, concrete definition. Its meaning depends not only on time and place, but also upon the person uttering it.” *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998).

143. For a detailed analysis of this issue, see law review articles cited *supra* note 7.

tial treatment where workforce diversity is the justification? Several commentators have suggested that the answer is a tentative yes, especially in light of the Supreme Court's reliance on the amicus arguments of corporate America¹⁴⁴ that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, culture, ideas, and viewpoints."¹⁴⁵

There are two potential goals that may be served by accepting diversity as a justification for affirmative action in the private workplace. Both harken back to Justice Steven's position in *Johnson* that affirmative action under Title VII could potentially be justified by business or social goals¹⁴⁶ and are arguably strengthened post-*Grutter*. The first concerns the positive impact of workplace diversity programs on company decision making and productivity as a result of a diverse workforce and its ability to better serve an increasingly diverse clientele.¹⁴⁷ The second concerns the social value gained from a diversified workplace including the ability to "counteract stereotyping and prejudices and cultivate broader and more inclusive trust and mutual regard within the workforce."¹⁴⁸

Whether courts will accept either of these two rationales depends in large part upon their willingness to shift their focus from language in *Weber* and *Johnson* regarding the remedial nature of the affirmative action to language, also in these cases, regarding "the value of voluntary employer action that advances Title VII's desegregative" goal.¹⁴⁹ In addition, it will be necessary to recognize that diversity initiatives that serve to more fully integrate minorities into predominantly white work-

144. See generally *supra* note 7.

145. See Estlund, *supra* note 7, at 215 ("[Major American business] may . . . have been planting the seeds for a defense of their own employment policies [since] [a]ffirmative action undoubtedly plays some role in the hiring and promotion decisions that go into creating the diverse workforces whose virtues these companies tout . . ."); see also Tilles, *supra* note 7, at 464 ("Any private employer that competes 'in today's increasingly global marketplace' may have a legitimate claim to needing an affirmative action plan under the *Grutter* rationale. *Grutter* signals this potential by listing the interests of 'major American businesses' as the first benefit of a diverse student population."); White, *supra* note 7, at 271 (noting "Justice O'Connor's majority opinion went out of its way to cite amicus briefs filed by major employers . . . that stressed the importance of diversity if industry . . . [is] to accomplish [its] goals.").

146. See *supra* note 106.

147. See Estlund, *supra* note 7, at 218-19 (noting that "[t]he evidence that racial diversity as such improves workplace decisionmaking and productivity is more equivocal" and claiming that, "where diversity is a given, the experience of intergroup cooperation can improve intergroup relations and attitudes.").

148. *Id.* at 224.

149. *Id.*

places are entirely “consistent with Title VII’s objective of ‘break[ing] down old patterns of racial segregation and hierarchy’”¹⁵⁰

Post-*Grutter* in-roads have already been made in the context of public employment, albeit in a narrow milieu. The Seventh Circuit, following in the footsteps of *Wittmer* has applied *Grutter*’s diversity rationale to decisions involving the metropolitan police force in Chicago.¹⁵¹ In *Petit*, the defendant used a promotional examination whose raw scores were standardized for race and ethnicity pursuant to an affirmative action plan for a limited time frame.¹⁵² In response to the plaintiffs’ challenge that the examination violated the Equal Protection Clause, the defendant asserted that the promotions based on the examination were necessary for several reasons: maintaining the operational effectiveness of the Chicago Police Department (“CPD”), remedying past discrimination in hiring and promotions, and avoiding a claim that the city’s past policies violated Title VII under an “adverse impact” theory.¹⁵³

In upholding the city’s defense regarding operational effectiveness, the appellate court extended the holding in *Grutter*:

It seems to us that there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago. Under the *Grutter* standards, we hold, the City of Chicago has set out a compelling operational need for a diverse police department.¹⁵⁴

The court noted just as it was proper to exercise a degree of deference to a university’s academic decisions in *Grutter*, it also was proper “to rely on the views of experts and Chicago police executives that affirmative action was warranted to enhance the operations of the CPD.”¹⁵⁵ The court further observed that it had previously “‘left open a small window for forms of discrimination that are supported by compelling

150. *Id.*

151. *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003).

152. *Id.* at 1112.

153. *Id.*

154. *Id.* at 1114.

155. *Id.* Specifically, (1) a criminal justice expert presented testimony that “an increase in minorities enhanced the public’s perception of the CPD, which in turn enhanced the department’s ability to prevent and solve crime”; (2) a former chief of another urban city testified “to the necessity of diversity among police supervisors, both for the community’s perceptions of police departments, but also internally in changing the attitudes of officers”; and (3) numerous top-ranking CPD officials testified as to the need to diversity at the sergeant rank including evidence that a) such officers “are in a unique position to influence officers on the street; and b) the presence of minority sergeants has improved police-community cooperation and “defused potentially explosive situations, such as the tense racial situation following riots . . . in a predominantly Hispanic community.” *Id.* at 1114-15.

public safety concerns, such as affirmative action in the staffing of police departments”¹⁵⁶

Moreover, the means chosen by the city to accomplish its compelling interest in a diverse police force was specifically and narrowly framed to meet that purpose, *i.e.*, it was limited in duration and did not unduly harm members of any racial group.¹⁵⁷ Specifically, the examination results were not used after 1991, and unlike the award of 20 points per candidate held unconstitutional in *Gratz*, the standardization process at issue (1) did not affect every “minimally qualified” candidate; and (2) could be viewed more as eliminating an advantage white officers had on the test rather than giving an arbitrary advantage to minority officers.¹⁵⁸

It is unclear what impact, if any, *Petit* will have on private employers under Title VII. At least one commentator, however, has noted the strange paradox resulting from *Petit*: under current law, the Equal Protection Clause, despite its stricter analysis, imposes fewer restraints on public employers than Title VII imposes on private employers.¹⁵⁹ The Supreme Court may ultimately find that divergence unacceptable and treat private employees similarly to public employees. Current case law,

156. *Id.* at 1114 (citing *Reynolds v. City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002)).

157. *Id.* at 1116-17.

158. *Id.* at 1117. In contrast, two district courts have rejected extension of *Grutter* to the public contracting context. In *Builders Ass’n of Greater Chicago v. City of Chicago*, 298 F. Supp. 2d 725 (N.D. Ill. 2003), the court reasoned that economic benefits are not permissible reasons for a set-aside program and the set-aside program was not narrowly tailored. *Id.* at 741-42. In a prior decision involving the same parties, the court granted the plaintiffs’ motion *in limine* to exclude the testimony of an expert to the effect “that there is an economic benefit which justifies the City’s racial and gender preferences.” *Builders Ass’n of Greater Chicago v. City of Chicago*, No. 96-C-1122, 2003 U.S. Dist. LEXIS 5155, at *22 (N.D. Ill. Apr. 1, 2003). The court noted that,

The Supreme Court has not definitively addressed the issue of whether non-remedial benefits can justify racial and gender classifications. But it is clear that the use of these justifications should be limited, and there are warnings against allowing a public institution to discriminate for any reason other than curing its own past discrimination. Defendant seeks to invoke a broad and limitless benefit, economic growth, to justify racial and gender preferences. To test that concept by another scenario, let us suppose a predominantly white municipality established a set-aside program requiring that a substantial proportion of its construction contracts go to whites, or established employment preferences for whites, on the supposition that such programs benefited the community. We know of nothing indicating that such programs could survive constitutional scrutiny, and economic benefits rationale has been struck down almost without comment.

Id. at *23-24 (citations omitted). The court did not reverse its position upon reconsideration post-*Grutter*. See also *Hershell Gill Consulting Eng’rs, Inc. v. Miami-Dade County*, 33 F. Supp. 2d 1305, 1316-17 (S.D. Fla. 2004) (noting, in dicta, that “*Gratz* and *Grutter* do not modify *Crosby* or *Adarand* in the area of public contracting.”). These cases are potentially significant from a private employment perspective only in so far as they reflect a general reluctance by courts to extend *Grutter* beyond its narrow context.

159. Tilles, *supra* note 7, at 463.

however, provides no strong indication regarding the resolution of this disparity.

VI. CONCLUSION

In the forty years since Title VII was enacted, the validity of voluntary affirmative action is no longer in question. However, private employers remain reluctant to adopt such practices for several reasons. First, the Supreme Court has failed, to a great extent, to define the line between permissible and impermissible affirmative action. This lack of clarity covers a range of issues from the precise contours of “manifest imbalance” in the workforce to the amount of preference to be accorded a minority or female as part of a lawful affirmative action plan.

Second, because voluntary affirmative action requires a finding of past discrimination or a significantly imbalanced workforce, employers may be reluctant to implement such programs and risk that these factual predicates will be used against them in litigation. Third, even if a business is not deterred by the litigation threat, the potential for public and/or employee relations repercussions remains, resulting from the stigma of an employer’s acknowledgement of past discrimination or a conspicuous imbalance in its employee population. This negative perception may only be exacerbated in these problems by giving preferential treatment to one group of employees over another.

How can Congress or the courts mitigate these concerns? One approach is for the courts to construe, or Congress to amend Title VII to permit voluntary affirmative action on the basis of workforce diversity. Using diversity as a justification for affirmative action avoids the problem of having to concede that past discrimination or a workforce imbalance exists. By permitting affirmative action under these circumstances, Congress or the courts would make it easier for businesses to adopt measures that are most likely to provide minorities and women with the opportunities needed to reach the goal of equal employment, which is, after all, what Title VII was designed to do forty years ago.